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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE TRINIDAD QUINTERO, Defendant and Appellant.	B166338 (Los Angeles County Super. Ct. No. TA065862)

APPEAL from a judgment of the Superior Court of Los Angeles County. Victoria M. Chavez, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Catherine Okawa Kohm, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Jose Trinidad Quintero challenges his continuous sexual abuse of a minor, procurement, lewd act, and forcible rape convictions on numerous grounds, including evidentiary error, instructional error, prosecutorial misconduct, and ineffective assistance of counsel. He further contends the trial court improperly imposed consecutive sentences on the basis of facts not found by the jury.

We conclude the trial court acted within its discretion in excluding, under Evidence Code section 352, the testimony of a man who one of the victims claimed raped her in an uncharged collateral incident. The court also acted well within its discretion by excluding evidence that the other victim had been molested by her brother. The court did not err by admitting under Evidence Code section 1108 evidence that appellant commenced a sexual relationship with the victims' older sister when she was 16, even though the conduct occurred in Mexico. The court neither erred nor violated appellant's constitutional rights by refusing to admit the entire tape of his interview with Detective Ruiz. The court properly refused to give circumstantial evidence instructions because the prosecution did not substantially rely upon circumstantial evidence. Because the prosecutor did not commit prejudicial misconduct, defense counsel's failure to object to various arguments was not prejudicial and did not constitute ineffective assistance. Appellant's continuous sexual abuse conviction did not preempt his procurement conviction. Appellant was not entitled to a jury determination of factors supporting imposition of consecutive sentences.

BACKGROUND AND PROCEDURAL HISTORY

The mother, sisters and brother of appellant's wife Y. moved to Los Angeles from Mexico to reside with appellant and Y. Y.'s younger sisters, including 15-year-old P. and 11-year-old I., began helping appellant with his commercial and residential cleaning work. Appellant began raping P. soon after she began to work with him. This continued for several months, until P. stopped working with appellant. A few months later, appellant began a sexual relationship with I., who believed she was in love with

appellant. During the course of the relationship, I. acceded to appellant's requests to have sex with other men who paid appellant money. The relationship between appellant and I. came to light after he took her, without permission, to Mexico and remained there approximately two months.

With respect to charges naming I. as the victim, a jury convicted appellant of continuous sexual abuse of a minor, procuring a child to engage in a lewd act, and committing a lewd act upon a child under the age of 14. With respect to charges naming P. as the victim, the jury convicted appellant of three counts of forcible rape. The jury also found true a multiple victim sex crimes allegation under Penal Code section 667.61, subdivision (e)(5). Appellant was sentenced to prison for 56 years to life.

DISCUSSION

1. Precluding appellant from calling a witness to deny he raped I. in a collateral, uncharged incident was not an abuse of discretion.

I. testified that after she and appellant returned from Mexico, they stayed together in a motel. Appellant dropped I. off at their home, but I.'s mother and sister Y., who was married to appellant, were angry and hostile. I. left the house and returned to the motel. She went to the room she had shared with appellant, but he was not there. During the night, a man knocked on the door and claimed to be a detective. She let him in. He said he knew "half of [her] life" and was going to check her over to see if she was hurt. He placed his fingers in her vagina, and raped her. He took her from the room, dropped her off at the entrance of a hotel, and took her to a casino. He then took her to a mobile home where his mother lived and introduced her to his mother. He subsequently raped her twice more, and returned her to the motel in the morning. Appellant was there, and I. told him what had happened. She later asked him for help, and he took her to the home of a woman whose carpet he had once cleaned. Appellant left, and the homeowner called the police. I. told the police about the rapes by the stranger and that her brother Alfredo had molested her for years.

Officer Edward Camacho testified for the defense that he interviewed I. and she

told him she had been raped by a man in a motel room, and then was taken other places, including the Karobe Casino. She said they only stayed in the casino for a few minutes before going to eat at a restaurant. The man then took her to a mobile home park and raped her again. I. showed Camacho the location of the casino, restaurant and mobile home. She said the man was about 30 and was named Oscar. Camacho obtained a surveillance videotape from the casino, which depicted I. entering the casino with two young men, and then leaving with the same two men four minutes later. Camacho testified that the men on the videotape appeared to be in their late teens or early twenties, and I. did not appear to be entering or leaving under force. He further testified that I. was calm and did not appear to be upset as she described what had happened to her.

Defense counsel sought to call Oscar S. as a witness to impeach I., explaining he lived in the mobile home I. pointed out to Camacho, and would testify that, in July 2002, he was staying in a motel on Firestone Boulevard when he met a girl who appeared to be 19 or 20 years old. She was with a man, but said she was scared and wanted to get away. Oscar called a taxi and they went to a restaurant together. After they ate, they walked to his mother's mobile home. He awakened his mother, and they talked. He denied having sex with the girl, who eventually returned to the motel. Defense counsel admitted that Oscar had not identified I., but proposed bringing I. into court during Oscar's testimony for identification.

The court excluded the proposed testimony by Oscar under Evidence Code section 352, stating that the probative value was weak, even if Oscar identified I. While his denial might show I. lied about the incident, it would not definitively attack her credibility and was highly unreliable because the witness would have an enormous incentive to lie when asked if he raped a 13-year-old girl. The jury thus would be required to decide who was telling the truth regarding this collateral point. The court also felt the evidence would unduly consume time and counsel would have to be appointed for Oscar.

Appellant contends the court erred by excluding Oscar's testimony, and this error

violated his rights to a fair trial and to present a defense.

Relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) Generally, any ruling on the admissibility of evidence is reviewed for abuse of discretion. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) This standard of review also applies to a trial court's determination under Evidence Code section 352. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

The trial court did not abuse its discretion by excluding the proposed testimony. The alleged rapes by Oscar were unrelated to the crimes charged against appellant. Although the prosecution first introduced the topic through I.'s testimony, its stated purpose was to explain how appellant's crimes came to light, as it was after the Oscar incident that I. first contacted the police, which ultimately led her to reveal her relationship with appellant. Introducing Oscar's testimony regarding the incident would have risked creating a mini-trial on the issue of whether Oscar raped I. His testimony thus would have created a substantial danger of confusing the jury and, at a minimum, it would have consumed an undue amount of time. Given the collateral nature of the incident and the inherent motive Oscar would have to lie if he indeed raped I., the probative value of the proposed testimony was weak. In essence, he could be expected to deny the accusation whether or not it was true. Moreover, there was uncertainty whether Oscar's story even pertained to I., as he had not been asked to identify her prior to trial. Accordingly, the trial court acted well within its discretion in concluding that the probative value of the evidence was substantially outweighed by the risks of undue consumption of time and confusion of the issues.

Appellant forfeited his constitutional claims by failing to assert at trial that his rights to a fair trial and to present a defense required admission of the evidence despite the court's evaluation under Evidence Code section 352. (*People v. Fauber* (1992) 2

Cal.4th 792, 854.) In any event, exclusion of Oscar's testimony did not deprive appellant of a fair trial or the right to present a defense. Enforcing the ordinary rules of evidence does not violate a defendant's due process rights. (*People v. Frye* (1998) 18 Cal.4th 894, 948.) Furthermore, I.'s testimony regarding the Oscar rapes was significantly impeached by Officer Camacho's testimony that the casino videotape depicted I. entering and leaving the premises with two men, both of whom appeared to be much younger than her description of Oscar. In addition, as appellant notes at page 15 of his opening brief, the evidence admitted provided numerous bases upon which I.'s credibility could be attacked, and appellant testified and denied the charges. Exclusion of Oscar's testimony therefore did not impair appellant's ability to present a defense. Appellant was not constitutionally entitled to present additional evidence on this collateral point, without regard to its weakness or flaws.

2. Excluding evidence that P.'s brother molested her was not error.

I. testified that her brother Alfredo began raping her when she was seven, and continued to do so even after the family moved to the United States. She twice told her mother about it, but her mother seemed not to understand and did nothing to stop it. She also told appellant about it, and when she finally contacted the police, she told them about Alfredo, at appellant's direction. I. testified against Alfredo at his preliminary hearing.

At trial, P. denied that she and Alfredo had ever engaged in any sexual activity. When the police asked her if Alfredo had ever touched her, she denied it, but told them appellant had. A few days later, she told the police everything that appellant had done to her.

Appellant testified that when Alfredo and P. helped him clean a store, he saw them lying on the floor in an embrace. They appeared frightened and stopped when appellant walked in on them.

Defense counsel sought to introduce unspecified evidence that Alfredo had raped P. His theory was that such evidence would impeach P. and tend to show that she

accused appellant of raping her to cover up for her brother. The court noted the events leading to P.'s accusation of appellant, and ruled appellant could argue that, because I. had been raped by Alfredo, P. may be "holding something back." However, the court precluded appellant from calling Alfredo or introducing his admissions, saying "we're not going to have a trial about Alfredo molesting . . . [P.]."

Defense counsel subsequently sought to ask Detective Richard Ruiz whether Alfredo admitted molesting P. and I., and represented to the court that the detective would answer affirmatively. The court sustained the prosecutor's hearsay, relevance, and Evidence Code section 352 objections. Defense counsel represented that Alfredo had been transported from state prison to the courthouse. The court reiterated that his proposed testimony was irrelevant.

Appellant contends the court erred by precluding him from calling Alfredo as a witness or introducing his admission that he raped P.[1] He contends that this error also violated his rights to a fair trial and to present a defense.

The trial court did not abuse its discretion in excluding Alfredo's testimony and prior statements. It appears the court's ruling was based upon Evidence Code section 352, as the court acknowledged the limited relevance of the evidence, but deemed it collateral and declined to "hold a trial" on the issue. Alfredo's proposed testimony had some probative value in that, if he admitted a sexual relationship with P., it would establish that her testimony denying such a relationship was a lie. However, the probative value was not strong, as the impeachment would have been directed to a collateral matter. The probative value was further diminished because it was unnecessary. As noted at pages 16 and 17 of appellant's opening brief, there were other matters in evidence that provided appellant with bases for attacking P.'s credibility. In addition, appellant testified that he observed P. and Alfredo in a somewhat compromising position. And the court effectively elicited an admission from P. that she had "a

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[1] Appellant does not challenge the court's ruling regarding his attempt to question

situation" with her brother. The court asked, "Just so I have this straight, the police come and talk to you on some day in July of 2002, and that's the first time you tell anybody about the situation involving your brother; is that right?" P. responded affirmatively. Defense counsel told the jury in his opening statement that Alfredo confessed that he had molested both P. and I., and I. testified that Alfredo had molested her. Given the seed planted in the jurors' minds by the opening statement, I.'s testimony about Alfredo molesting her, the admission elicited from P. by the court, and appellant's testimony, it is highly probable the jury inferred that Alfredo molested P., which necessarily meant that P.'s denial in court was false.

Apart from any impeachment value it had, the evidence had a slight tendency to show that P. might have fabricated her claims against appellant to deflect suspicion from Alfredo. However, this purpose was fully accomplished by P.'s admission that she first mentioned appellant's conduct toward her when the police asked her if Alfredo had ever touched her. In combination with other evidence and the argument suggesting that Alfredo molested both I. and P., P.'s admission regarding the timing of her disclosures provided a complete basis for appellant to argue the desired inference, i.e., that she fabricated her accusations against appellant to protect her brother.

Arrayed against the weak probative value of this evidence was the strong risk that its introduction would consume an undue amount of time and confuse the jury. Just as with the proposed testimony by Oscar, introducing Alfredo's testimony or statements would have required the jury to determine a collateral issue: whether Alfredo molested P. Accordingly, the trial court did not abuse its discretion by concluding that the probative value was substantially outweighed by the risks of undue consumption of time and confusion of the issues.

Appellant forfeited his constitutional claims by failing to assert at trial that his rights to a fair trial and to present a defense required admission of the evidence despite

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Detective Ruiz on the subject.

the court's evaluation under Evidence Code section 352.

3. Evidence that appellant commenced his sexual relationship with Y. when she was underage was properly admitted under Evidence Code section 1108.

Appellant's wife, Y., testified that she was 16 when she met appellant. At the time of trial she was 25. Their oldest child was eight. Appellant did not object to this testimony.

While cross-examining appellant, the prosecutor asked whether he was 30 and Y. 16 when they met. Appellant objected on the ground of relevance. The court noted that Y. had already testified she was a minor when she became involved with appellant, and that another crime might be established if appellant admitted that they entered into a sexual relationship at that time. However, the court believed the evidence would be properly admitted as propensity evidence. Defense counsel argued that the legal age was different in Mexico and suggested appellant could testify to this point. The court stated that appellant was not qualified to testify regarding the laws of Mexico. Defense counsel expanded his objection to include Evidence Code section 352, stating that the evidence was prejudicial and would confuse the jury. The court ultimately ruled the evidence was admissible under Evidence Code section 1108 because appellant's conduct with Y. would have constituted a violation of Penal Code section 261.5. The court found the evidence would not be unduly prejudicial or result in an undue consumption of time.

The prosecutor then asked whether appellant enjoyed having sex with teenage girls. Defense counsel objected that the question was argumentative. The court overruled his objection, and he responded that he did not. The prosecutor asked whether he was 30 and Y. was 16 when he first had sex with her. Appellant responded, "Well, it was normal because in Mexico it's the usual thing that you could get married at 15 years of age." Appellant subsequently testified that Y. was not attractive to him when she was 16, but he loved her. He further denied he was attracted to P. and I.

Appellant contends the trial court erred by admitting this testimony because Evidence Code section 1108 requires commission of a crime under the laws of California

or the United States, but his conduct with Y. occurred in Mexico. He further argues that the prosecutor never established that his sexual relationship with Y. violated Mexican law.

Evidence Code section 1101 prohibits the admission of evidence of other offenses or misconduct to prove criminal propensity, but permits admission of such evidence to prove matters such as motive, intent, identity, or a common design or plan. (Evid. Code, § 1101, subds. (a), (b).) Evidence Code section 1108 establishes an exception to section 1101, authorizing the admission of evidence of the defendant's commission of another sexual offense or offenses "[i]n a criminal action in which the defendant is accused of a sexual offense," provided the evidence is admissible under Evidence Code section 352.

As a preliminary matter, the propensity evidence was fully placed into the record without objection by appellant when Y. testified she was 16 when she met appellant, and about her current age and the age of their oldest child. By simple subtraction, the jury could readily determine that Y. was 17 when she had her first child with appellant. Appellant therefore forfeited his objection to the propensity evidence by failing to raise it during Y.'s testimony. Based upon her testimony, the trial court would have been justified in instructing the jury with CALJIC No. 2.50.01, which instructs the jury how to view and use propensity evidence admitted under Evidence Code section 1008. Moreover, the question to which appellant objected during his cross-examination by the prosecutor reiterated Y.'s age and added appellant's age. The court deferred ruling on appellant's objection, and when examination resumed after the court announced its ruling, the prosecutor never re-asked the question in controversy.

In any event, appellant's statutory interpretation contention has no merit. In construing a statute, we attempt to determine the intent of the Legislature. (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) In determining that intent, we first examine the words of the statute. (*Ibid.*) The words used in a statute are construed in accordance with their usual or ordinary meaning. (*People v. Edwards* (1991) 54 Cal.3d 787, 833.) Significance should be attributed to every word and phrase of a statute, and a

construction making some words surplusage should be avoided. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) We consider the statute as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) We select the construction that best comports with the apparent intent of the Legislature, with a view to promoting the purpose of the statute, and avoiding absurd consequences. (*Ibid.*; *People v. King* (1993) 5 Cal.4th 59, 69.) If the terms of a statute provide no definitive answer, we may resort to extrinsic sources, including the ostensible objectives and the legislative history. (*People v. Coronado*, *supra*, 12 Cal.4th at p. 151.)

Evidence Code section 1108, subdivision (a), permits admission of "evidence of the defendant's commission of another sexual offense or offenses." Evidence Code section 1108, subdivision (d)(1), defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code." The statute does not require that the uncharged "sexual offense" results in a conviction or even that any charges were filed pertaining to the other offense. Nor does the statute require that the uncharged offense could have been prosecuted in the jurisdiction in which it was committed or in California or elsewhere in the United States. It also does not require that the conduct constituting the uncharged offense occur within California or elsewhere in the United States. Had the Legislature intended to limit the scope of evidence admissible under section 1108 to evidence of uncharged sexual offenses committed within the United States, it could easily have done so. Subdivision (d)(1) requires only that the sexual conduct in issue is a type that would constitute a crime under federal or state law involving one of the categories of conduct enumerated or described in subsections (A) through (F). Appellant's attempt to read jurisdictional requirements into the statute is unsupported by the language of the statutory provisions. A statute may not be rewritten by a court to conform to an assumed

intent that does not appear from its language. (*Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381.)

Moreover, conduct falling within the definition of "sexual offense" set forth in Evidence Code section 1108, subdivision (d)(1), is equally probative of a propensity to commit a sexual offense, whether it occurs inside or outside of the United States. This is true without regard to the status of such conduct under foreign law, as its probative value stems from the nature of the conduct, not from its illegality. Accordingly, appellant's proposed interpretation of the statute is contrary to the apparent intent of the Legislature in excepting sexual offense propensity evidence from exclusion under Evidence Code section 1101. Accordingly, the trial court did not err in concluding that evidence of Y.'s age when she and appellant commenced a sexual relationship supported an inference that appellant committed a prior sexual offense, i.e., conduct proscribed by Penal Code section 261.5, subdivision (c).[2]

The trial court further did not abuse its discretion by concluding that Evidence Code section 352 did not require exclusion of the evidence. Given the enactment of Evidence Code section 1108, courts may no longer deem evidence of prior sexual offenses unduly prejudicial per se. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917.) Instead, the court must engage in a careful weighing process under Evidence Code section 352. In doing so, the court must consider factors such as the nature, relevance, and remoteness of the prior offense; the degree of certainty of its commission; the likelihood of confusing, misleading, or distracting the jurors from their main inquiry; the

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2 Penal Code section 261.5, subdivision (c), provides as follows: "Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison."

Although appellant did not state his age at the time he commenced a sexual relationship with Y., it appears from other matters in the clerk's transcript that he was 39 or 40 years old at the time of trial. The jury viewed appellant and heard him testify, and was therefore capable of determining whether he was more than three years older than Y.

similarity of the prior offense to the charged offense; the likely prejudicial impact on the jurors; the burden on the defendant in defending against the uncharged offense; and the availability of less prejudicial alternatives to outright admission of the prior offense, such as admitting some but not all of the prior sex offenses, or excluding irrelevant though inflammatory details surrounding the offenses. (*Id.* at p. 917.)

The evidence in question was not remote, because it was conduct that occurred approximately six years before P. and I. moved in with appellant and Y. Additionally, P. testified that appellant began raping her as soon as she began working with him, which occurred very soon after the family's arrival in California. Appellant's conduct with Y. at age 16 was highly relevant because it tended to show his propensity to engage in sexual relationships with underage women. Moreover, P. was just one year younger than Y. was when appellant commenced a relationship with her. The evidence was extremely simple and quickly elicited during Y.'s testimony and therefore created no risk of confusing the jury or consuming undue time. It included no inflammatory details, but consisted of mere ages and dates. Accordingly, evidence of appellant's prior "sexual offense" constituted relevant circumstantial evidence that he committed the offenses charged in this case. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 920.) The trial court properly admitted it.

Moreover, the jurors could contrast the age difference between appellant and Y. when they were in the courtroom. The jurors could estimate Y.'s age when the sexual relationship began from her testimony about her current age and the age of their oldest child. Appellant explained the custom of marrying at a younger age in Mexico. Assuming any error regarding evidence of his conduct in Mexico with Y., the error was nonprejudicial.

4. Appellant's constitutional rights were not violated by the trial court's refusal to admit the entire tape of his interview with Detective Ruiz.

During his cross-examination of appellant, the prosecutor asked about statements he had made to Detective Ruiz that were inconsistent with his trial testimony. Appellant

denied making the statements. The prosecutor called Detective Ruiz as a rebuttal witness to testify that appellant in fact made particular statements. During his cross-examination of Ruiz, defense counsel asked the court to permit him to give the jury the entire transcript of the interview, rather than cross-examine Ruiz about every inconsistent statement. The prosecutor objected, and defense counsel asserted that the transcript had to be considered as a whole. The court explained that was only true if it was not severable and all statements pertained to a single topic. The court also was reluctant to play the tape of the interview, which was conducted in Spanish, without a translation.[3] Accordingly, defense counsel questioned Ruiz about appellant's statements.

After counsel finished questioning Ruiz, defense counsel asked to play the tape of the interview and provide the jurors the transcript of the interview with its translation so that they could read along. He argued it was important that the jury hear how appellant sounded during the interview. The prosecutor objected that counsel had a full opportunity to cross-examine Ruiz about the interview and portions not discussed were inappropriate for the jury's consideration. The court found the tape had little relevance and, since appellant testified, his statements during the interview were significant only to the extent they were "possibly inconsistent with his testimony." The court noted that the situation would be different if appellant had not testified, but under the circumstances the "probative value of listening to a Spanish language tape for purposes of inflection, and reviewing a translation in English" was slight.

Appellant contends the court erred by excluding the tape and a translation, either by an interpreter or the existing transcript. He further argues the exclusion violated his constitutional right to equal protection. His theory is that prosecutors are routinely permitted to play audio- or videotaped statements to prove their case, and "[t]o deny the accused this same opportunity simply because he is Hispanic and his statements were obtained in Spanish is discrimination which cannot be tolerated. If the prosecution is

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[3] The court may have been referring to a live translation, as the transcript of the tape

entitled to use actual tape recordings of a defendant's statements to prove guilt, the defendant must be given an equal privilege to use those same tapes to disprove guilt."

Appellant's theory overlooks a critical distinction between a prosecutor's use of a statement made by a defendant, whether taped or not, and a defendant's use of the statement. A statement by the defendant to a police officer is hearsay if introduced to establish the truth of matters stated in the statement. If a prosecutor seeks to introduce a defendant's incriminating statement to establish the truth of matters stated, it is admissible under the party admission exception to the hearsay rule. (Evid. Code, § 1220.) The party admission exception is inapplicable, however, where the defendant attempts to introduce portions of his own statement because the statement must be offered against the declarant. While a defendant might, under the proper circumstances, be able to introduce portions of his own statement as a prior consistent statement (Evid. Code, §§ 791, 1236), this would not support admission of the entirety of a long interview, such as in this case. As appellant did not suggest to the trial court, and has not suggested on appeal, that the tape and translation would be admissible as prior consistent statements, we need not address the specifics of such a theory.

Appellant's briefs argue that he was entitled to introduce the tape and translation under Evidence Code section 356. The statute provides that "[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." The purpose of Evidence Code section 356 is to avoid creating a misleading impression. (*People v. Arias* (1996) 13 Cal.4th 92, 156.) It applies, however, only to statements which have some bearing upon, or connection with, the portion of the conversation originally introduced. (*People v. Zapien*

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included an English translation along with the Spanish statements.

(1993) 4 Cal.4th 929, 959.) Statements pertaining to other matters may be excluded. (*People v. Williams* (1975) 13 Cal.3d 559, 565.)

Accordingly, to the extent the prosecutor asked Ruiz whether appellant said certain things, appellant would have been entitled to introduce appellant's entire response on the particular point, if the entire response was necessary to make his response understood. This, however, was not what appellant sought. He did not ask the court to permit him to introduce his entire response to a particular question or on a particular subject matter, and did not argue that an entire response was necessary to a proper understanding of his response. Instead, he sought to introduce the entire interview, which covered a variety of topics, including his conduct toward I., a grievance he had about Y., I.'s statements about Alfredo, appellant's consumption of alcohol, and statements he made to a particular man about I. Evidence Code section 356 does not authorize a wholesale introduction of an entire conversation addressing multiple topics simply because some portions may enhance the understanding of other portions previously introduced. It also does not authorize introduction of an audiotape so that the jury can hear inflection or possibly draw other inferences regarding the declarant's demeanor when he made the statement.

Accordingly, appellant's desire to admit the tape and a translation was contrary to the established rules of evidence. A similarly situated defendant trying to introduce an English language tape would have been no more successful in achieving this goal. Accordingly, appellant cannot establish an essential element of any equal protection claim: unequal treatment of persons who are similarly situated. (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) The trial court neither erred nor violated appellant's constitutional rights by refusing to admit the entire tape and a translation of it.

5. Refusal to instruct with CALJIC No. 2.01 was proper.

Appellant asked the court to include CALJIC No. 2.01[4] in the jury instructions. The court denied the request on the ground that the prosecution was not relying substantially on circumstantial evidence. Defense counsel noted that the circumstantial evidence included medical records regarding I. and inferences to be drawn from the testimony of witnesses other than P. and I. The court deemed such evidence corroborative and declined to give the instruction.

Appellant contends the court erred by refusing to instruct with CALJIC No. 2.01. He argues that both the prosecution and defense relied upon circumstantial evidence. He points to portions of the prosecutor's argument referring to the evidence of appellant's relationship with Y. in Mexico, appellant's statements to Detective Ruiz, the testimony of a man who had paid appellant to have sex with I., the testimony of a nurse practitioner regarding a sexual assault examination of I., and appellant's opportunity to commit the offenses. He also notes that the defense relied upon circumstantial evidence such as the failure of P. and I. to timely accuse appellant, the absence of any eyewitnesses, and the apparent falsity of I.'s testimony regarding the kidnapping and rape by Oscar.

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[4] CALJIC No. 2.01 provides as follows:

"However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

Circumstantial evidence instructions, such as CALJIC No. 2.01, are only necessary where the prosecution substantially relies on circumstantial evidence to prove its case. (*People v. Brown* (2003) 31 Cal.4th 518, 562.) If circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant committed the crime charged, circumstantial evidence instructions should not be given, as they may confuse and mislead the jury. (*Ibid.*) Circumstantial evidence instructions are not required where the circumstantial evidence corroborates and is incidental to the direct evidence. (*People v. Jerman* (1946) 29 Cal.2d 189, 197.)

The prosecution's case against appellant did not substantially rely upon circumstantial evidence. Direct evidence, in the form of testimony by P., I. and the man who admitted paying appellant to have sex with I., established appellant's guilt of the crimes charged. The circumstantial evidence, such as the nurse's testimony and the testimony of Y. and the victims' mother, was corroborative and incidental. Moreover, propensity evidence necessarily supports only one reasonable inference--that the defendant is predisposed to commit a particular type of crime. A court need not instruct upon circumstantial evidence principles where the evidence is not equally consistent with a reasonable conclusion of innocence. (*People v. Jerman*, *supra*, 29 Cal.2d at p. 197.) Accordingly, the prosecution's reliance upon propensity evidence admitted under Evidence Code section 1108 did not require instruction with CALJIC No. 2.01.

With respect to the defensive reliance upon circumstantial evidence, CALJIC No. 2.01 was of no benefit to appellant. The instruction is framed in terms of findings of guilt based upon circumstantial evidence. Only the last two sentences of the instruction are potentially applicable to defensive reliance upon circumstantial evidence. Appellant has not attempted, however, to show that it is reasonably probable that, had the trial court instructed the jury with the last two sentences of CALJIC No. 2.01, the jury would have

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"If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

returned a verdict more favorable to appellant on the basis of the delayed accusations, the absence of eyewitnesses, or the apparent falsity of at least some aspects of I.'s testimony about Oscar.

6. Defense counsel did not render ineffective assistance by failing to object to various portions of the prosecutor's argument.

Appellant contends that several statements by the prosecutor in his arguments constituted misconduct. Because defense counsel did not object to any of these statements, appellant contends his trial attorney rendered ineffective assistance.

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable probability that, but for counsel's errors, appellant would have obtained a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

Conduct by a prosecutor that does not violate a ruling by the trial court is misconduct only if it amounts to the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury or is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Silva* (2001) 25 Cal.4th 345, 373.) If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we must consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Benson* (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have construed the statement to state or imply nothing harmful. (*Ibid.*) A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) A prosecutor may not, however, suggest the existence of "facts" outside of the record by arguing matters not in evidence. (*People v. Benson*, *supra*, 52 Cal.3d at p. 794.)

Absent a showing that the harm could not have been cured, an appellant may not complain of prosecutorial misconduct unless he objected to the alleged misconduct in a

timely fashion at trial and requested that the jury be admonished to disregard the impropriety. (*People v. Benson*, *supra*, 52 Cal.3d at pp. 794-795.)

a. Assertion that appellant was born and raised in the United States

Appellant first complains the prosecutor argued facts outside the record by arguing that appellant was born and raised in the United States. Appellant misreads the record. The prosecutor stated he himself, not appellant, was born and raised in the United States.[5] The prosecutor's words were not ambiguous. No reasonable juror would have misunderstood the statements as appellant has.

b. Prosecutorial strategy and future prosecution of Mora

Appellant also complains the prosecutor "effectively testif[ied]" to support the credibility of prosecution witness Mora, the man who admitted paying appellant to have sex with I.

The prosecutor stated that Mora was "no friend of the prosecution. And Mr. Mora as we are here in this room at this time is in real trouble." The prosecutor further stated, with respect to Mora, "You heard that at the time he testified he had not been charged with any crime, and that's really a tactical decision on our part. And I'll tell you why. Candidly we hadn't charged him before he testified because we didn't want to give him anymore reason to take the 5th Amendment and come in and not testify. [¶] But now he has testified, and what's really important for you is not what we did tactically. And, of course, we have plenty of time to hold Mr. Mora accountable for what he did, and we will. But what's most important to you is that when he came in here and testified, he acknowledged that no promises were made to him of any kind, and that he acknowledged that he could get in trouble for what he was admitting to you in open court. And after all, he had already admitted on audiotape anyway."

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[5] This statement was apparently part of the prosecutor's attempt to explain the failure of P. and I. to report appellant's conduct. The theory was that they were recent immigrants and quite vulnerable to appellant's threat to expel them from his home if they told anyone what he had done.

Most of the argument was supported by Mora's testimony that he knew what he had done was both wrong and criminal, he was aware he could be prosecuted for his conduct, he voluntarily agreed to testify, and no one had made any promises to him. On cross-examination, Mora testified he did not expect "to be treated better" because he came to court and testified. Although the prosecutor's statements regarding his office's "tactical decision" not to charge Mora prior to his testimony and its intention to "hold Mr. Mora accountable" addressed decisionmaking as to which there was no evidence, there was no probability the jury would consider that Mora's credibility was bolstered by the prosecutor's tactics or plans. The portion of the prosecutor's statements that supported Mora's credibility was completely based upon Mora's testimony.

c. Accusation of perjury and reference to tape and transcript

Appellant also complains the prosecutor accused appellant of perjury and supported the accusation by reference to the tape and transcript that appellant was precluded from introducing.

The remark in question was made in the context of the prosecutor's discussion of appellant's denial on cross-examination that he made certain admissions to Detective Ruiz. The prosecutor argued, "Detective Ruiz testified that the defendant talked to him about this conversation he had with Mora about Mora's interest in I. And it blew my mind. First of all the defendant testified he had no recollection of telling the detective that he may have had sex with I. at all. He then testified under oath that he never had a conversation with Mora about Mora's interest in I. And further that he never told the detective anything about Mora's interest in I. And it blew my mind because we know that conversation was recorded, and we both had transcripts of the tape in front of us. [¶] So that was just out and out perjury. That was out and out false statements in court under oath to you. And it was really bizarre. He gets back up on the stand in surrebuttal, and all of a sudden, yeah, he remembers this conversation with Ruiz, and that's when he makes the ridiculous statement [that] what he meant by not consciously is that maybe the girl climbed on top of him when he was unconscious or something to that effect."

A prosecutor may state that a defendant lied in his testimony or out-of-court statements, so long as the prosecutor argues inferences based on evidence, not his or her personal belief based on personal experience or evidence outside the record. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) Here, the prosecutor's reference to perjury was based upon the evidence: Ruiz's testimony that appellant made certain statements and appellant's denial that he had made those statements.

Although the tape and transcript were not admitted in evidence, both Ruiz and appellant testified that their conversation was tape recorded, on several occasions the prosecutor asked appellant whether his recollection would be refreshed if the prosecutor showed him a copy of the transcript, Ruiz testified he had reviewed the transcript and tape of his interview with appellant that day and on prior occasions, and defense counsel showed Ruiz the transcript to refresh his recollection regarding certain statements and phrasing. Accordingly, the existence of the tape and transcript recording appellant's interview with Ruiz was in evidence. The prosecutor's reference to them did not introduce facts outside the record. Although it would have been preferable for the prosecutor not to mention the tape or transcript, his brief reference to them would not, in context, be understood by reasonable jurors to mean that the jury should rely upon the unadmitted tape or transcript to determine appellant's credibility. Instead, the prosecutor supported his attack on appellant's credibility by contrasting appellant's testimony with Ruiz's, both in terms of contradictory statements and significant matters to which appellant testified, but of which he had not told Ruiz.

Even if the argument constituted misconduct, it is not reasonably probable that appellant would have obtained a more favorable result had the prosecutor not referred to the tape and transcript. (*People v. Ochoa* (2001) 26 Cal.4th 398, 442.) Ruiz testified that appellant in fact made several particular statements that appellant denied making. For example, appellant denied on cross-examination that when Ruiz asked him if he had had sex with I., he said, "I was drinking heavily at the time, so if I was drunk, maybe I did. I don't know." Ruiz testified that appellant made that statement. Ruiz also testified that

appellant omitted telling him about certain important matters to which appellant testified at trial. For example, appellant testified that he told I.'s mother and Y. he was going to take I. to Mexico, and they were indifferent. He further testified that his purpose in taking I. to Mexico was to take her to her father, but when they arrived in the town in which I.'s father lived, I. refused to tell him her father's address, began to cry, and told him her father also had molested her. Ruiz testified that appellant never mentioned anything about taking I. to her father and said his greatest crime was taking I. to Mexico. Given Ruiz's testimony contradicting appellant's testimony, together with the testimony of P., I. and Mora, it is highly improbable that appellant would have obtained a more favorable verdict if the prosecutor had not stated that the conversation was recorded and the parties had transcripts of it.

d. Characterization of appellant as a pedophile

Appellant next complains that, without expert testimony on the point, the prosecutor labeled appellant a "pedophile" and stated, "You don't outgrow that."

While discussing the Evidence Code section 1108 evidence, the prosecutor stated, "He had sex with Y. when he was 30 and she was 16. Now, that's important, because that's evidence of his propensity to commit the kind of crimes that he's charged with. In other words, is this a guy who is going along with a normal life, a normal interest in adult females, who is accused of touching a 12-year-old or having sex with a 15-year-old? No, this is a man who's done it before. Okay. And that is for [you to] consider as evidence of his disposition toward young girls, of his interest in young girls. His desire for young girls. . . . [¶] . . . [¶] It's the same desire that's operating in his mind when he looks at her 15-year-old sister and the whole family looked remarkably alike. He probably had a flashback. Wow, that's Y. at 16. And then he slept with her. And then the same thing with I. He's a pedophile. That's the definition of a pedophile. You don't outgrow that. It's not a mistake. It's happened once, twice, three times that we know of."

The evidence of appellant's conduct with respect to I., P. and Y. supported the prosecutor's characterization of appellant as a pedophile. In the context in which the

remark was made, no reasonable juror would have understood that the prosecutor was relying upon an expert's diagnosis of appellant, as opposed to the clear inference to be drawn from the evidence of appellant's three sexual relationships, at least one of them involving the use of force, with underage women. Given widespread news coverage and public concern regarding pedophiles, we believe "pedophile" is used commonly enough to be understood without the benefit of expert testimony.[6] Indeed, if jurors believed the evidence regarding appellant's conduct toward Y., I. and P., it is probable that most, if not all, of them would have independently concluded that appellant was a pedophile based upon the clear pattern of his conduct and their common understanding of the term.

Although the prosecutor's statement about not outgrowing pedophilia approached dangerously close to rendering an unqualified, unsworn expert opinion, it was harmless because appellant's pattern of conduct indicated he had not "outgrown" his sexual desire for underage women. Given the strength of the testimony of P., I. and Mora, appellant's contradictory statements, and the propensity evidence admitted under Evidence Code section 1108, it is highly improbable that appellant would have obtained a more favorable verdict if the prosecutor had not made his remark about outgrowing pedophilia.

e. Only appellant had not "paid" or taken responsibility

The prosecutor argued that appellant wanted to shift the blame for the sexual assaults from himself to Alfredo. He stated, "Now, the defense wants to present this case to you as a case of it either being Alfredo, or it being the defendant. This is a case about it being both Alfredo and the defendant who took advantage of I. And the defendant came upon an opportunity to get close to I. that was created by Alfredo. Alfredo was first. He is the person who made her vulnerable. And he opened the door for the defendant to walk in and buddy up to I. and win her confidence and trust and love. And

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[6] The Oxford American Dictionary of Current English defines "pedophilia" as "sexual desire directed toward children." (The Oxford American Dictionary of Current English (Oxford University Press, Oxford Reference Online, 1999).

he compounded injuries that were already inflicted. [¶] Now, Alfredo, you heard testimony about Alfredo. And I tried in this case to really keep us focused on these charges. I know you have a curiosity about Alfredo's case. And you may have some curiosity about what happened in Southgate.[7] But I really tried to keep us focused on the purpose we're here for. If you have questions about any aspect of this case when your deliberations are done, I'll be happy to talk to you about those things to the extent that I can. [¶] But this isn't a trial--this isn't Alfredo's trial. Alfredo is getting his just deserves [*sic*] right now. He is paying the price for what he did. This is Quintero's trial. And you saw the injuries to [I.]. . . . [¶] She paid a price for doing no harm to no one. To anyone. You heard [P.], and her testimony about the things he did to her. . . . [¶] The only person up to this point who hasn't paid or hasn't taken any responsibility or shown any remorse for his conduct is the defendant in this case, Quintero."

Appellant contends this argument was calculated to bolster I.'s and P.'s credibility by implying that Alfredo had raped only I. He further contends that the prosecutor implied that Oscar had taken responsibility for his conduct in what counsel were referring to as the "Southgate rape." Because appellant was not permitted to call Oscar as a witness to deny raping I., appellant argues that the prosecutor's statement constituted "gross misconduct."

Although the prosecutor included one reference to jurors' potential curiosity about "Southgate," this portion of his argument focused upon Alfredo. The prosecutor repeatedly referred to Alfredo by name and explained the limited relevance of Alfredo's conduct in consideration of the charges against appellant. Just before stating that appellant had not "paid or . . . taken any responsibility," the prosecutor explained that Alfredo had "paid" for his conduct and I. had "paid" with the injuries she suffered.

<http://www.oxfordreference.com> [as of July 22, 2004].) A pedophile is, of course, one who "displays pedophilia." (*Ibid.*)

[7] While the court reporter did not separate "South Gate" into two words, judicial notice is taken of the correct spelling of the city's name.

In context, reasonable jurors would not understand the statement in controversy to mean that Oscar had taken responsibility for his conduct. The argument effectively contrasted the consequences suffered by Alfredo, I. and appellant. The focus of this argument was quite obviously Alfredo, and the reference to South Gate was limited to juror curiosity. Prior to the statement in issue, the prosecutor had mentioned the South Gate rape only once, while discussing I.'s injuries. At that time, he argued that "the fact that the injuries were at various stages of healing is important because one cannot say, well, those happened when the guy raped her in Southgate. They didn't all occur at the same time. Undoubtedly she probably had a couple of injuries from that injury in Southgate." Nor did the prosecutor mention South Gate further in his opening argument. Accordingly, taken in context, reasonable jurors would not understand the reference to South Gate and the later, separate statement that appellant was the only one who had not "paid" or taken responsibility to mean that Oscar had taken responsibility or "paid" for a sexual assault on I.

Nor would reasonable jurors understand the prosecutor's remarks to mean that Alfredo had raped I. but not P. Nothing in the remarks remotely suggests such a meaning. Appellant's claim that the statements in controversy were an attempt to bolster I.'s and P.'s credibility is equally unsupported by the prosecutor's words. The clear thrust of the argument was to overcome appellant's apparent claim that I. and P. accused him only to deflect blame from their brother. The prosecutor did not vouch for I. or P. or use any other improper technique to convince jurors that they were credible.

f. Status of South Gate case

Defense counsel argued at length that the evidence regarding the South Gate rape proved that I. lied about it, from which the jury could infer that she was also lying in her testimony against appellant. In response, the prosecutor began his closing argument by stating, "You know, it's a good thing that the judge tells you that what the attorneys say during trial is not evidence. Because attorneys sometimes say things during their argument that just are not supported in the record of the trial at all. [¶] Counsel talks first

about Southgate. And it's of no surprise to me that he spent more time talking about Southgate than [he did] this case because we had not solved that case to the point where we could present it to a jury. But there are a couple of things that you heard about Southgate, and you should remember. [¶] No. 1, there is a tape. And you know if this tape were so important, if it showed such a big lie, why didn't he play it for you? The tape has no evidentiary value in this case whatsoever. And that's why he didn't pop it in the VCR and say look, this proves. That's a smokescreen to try to distract and get you thinking about Southgate instead of thinking about Quintero."

Appellant contends the prosecutor's reference to the South Gate case not being solved to the point where prosecutors could present it to a jury constituted misconduct because it implied that the case was in the preliminary hearing or pleading stage and suggested the prosecutor's personal belief in I.'s testimony.

A prosecutor may make comments that would otherwise be improper if they are fairly responsive to argument of defense counsel and based on the record. (*People v. McDaniel* (1976) 16 Cal.3d 156, 177.) The prosecutor's statement about solving the South Gate case was no doubt intended to respond to defense counsel's extensive argument regarding the incident, but it was not fairly responsive. Defense counsel's arguments were limited to contentions that the casino's surveillance tape proved that the incident did not occur as I. said it had, and this, in turn, established that I. was a liar. He did not state or imply that no one had been prosecuted for the incident. Accordingly, the prosecutor's remark about the status of the case was not fairly responsive to defense counsel. It was also not based upon the record. Most importantly, it suggested that there was in fact a pending investigation or prosecution regarding the incident. This, in turn, suggested that I. was telling the truth about what happened in South Gate. The remark therefore effectively suggested that matters outside the record established the truth or probable truth of I.'s testimony. This constituted misconduct. (*People v. Padilla* (1995) 11 Cal. 4th 891, 946, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.)

Nonetheless, misconduct is harmful only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor not engaged in misconduct. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 442.) In context, and in light of the strong evidence of appellant's guilt provided by the testimony of P., I. and Mora, it is not reasonably probable that appellant would have obtained a more favorable verdict if the prosecutor had not made his improper statement about the status of the South Gate rape case. That incident was distinct from the charges against appellant, and nothing suggested appellant was in any way responsible for it. Officer Camacho's testimony strongly suggested that I.'s story about what occurred was at least partially untrue, and his status as a police officer permitted an inference that investigators did not believe the evidence supported the charges against Oscar. Moreover, the prosecutor's message in this portion of the argument was that the defense's extensive arguments about South Gate were meant to distract the jury from the real issues in the case, and the South Gate incident was not one of those issues. The prosecutor prefaced the improper remark with a reminder that the arguments were not evidence, and the court instructed the jury accordingly. Under the circumstances, a different result was not reasonably probable.

g. Not an aggressive prosecution

The prosecutor also argued that his case was strong. He said, "And it's a very good case in part because of the way the case is charged. That this is not an aggressive prosecution by any stretch. [¶] The charges are very limited, and well within the bounds of the evidence. He's not charged with 40 counts of rape on [P.]. He is not charged with raping [I.]. He could be because even though she was willing, you can't give legal consent to have sex with an adult at 12. You don't have to passively make those kind[s] of decisions. He could be charged with kidnap. [¶] This information and the way it's put together is narrowly tailored to his conduct. And that's why it's essential and that's why we're asking you to find him guilty of each and every count and find the special allegation true."

Appellant contends this argument was a lie calculated to cause the jury to believe

appellant needed to be punished on the few charges filed against him because he had escaped punishment on the unfiled charges. In this regard, he notes that he was charged with kidnapping in this case, but the charge was dismissed upon his Penal Code section 995 motion.[8] Respondent agrees that "the prosecutor probably should not have stated that appellant could have been charged with kidnapping," but argues that the remainder of the argument was permissible.

The prosecutor's reference to other possible charges was inadvisable. However, we do not believe that the jury would have understood it to mean that appellant had been treated leniently or escaped punishment. The essence of this argument was that the evidence supported the charges and the prosecutor wanted the jury to convict appellant of each charge. This is precisely what prosecutors argue in every case. The jury was unlikely to see the applicability of a kidnapping theory, since there was no evidence that appellant took P. or I. anywhere against her will. Accordingly, it is extremely unlikely the prosecutor's reference to kidnapping had any effect upon the jury. It is also unlikely the reference to unfiled rape charges had any effect on the verdict. If the jury believed P., it would convict appellant of the charged rapes. If it did not believe P., it would not convict appellant of any of the rape charges, simply because more charges could have been filed. Similarly, if it believed I., it would convict appellant of the continuous sexual abuse, lewd act, and procurement charges. If it did not believe her, it certainly would not convict appellant of these charges simply because the prosecutor could have filed other charges as well. Accordingly, there was no probability that any potential for unfairness created by the prosecutor's reference to other charges was realized.

Because the prosecutor committed no prejudicial misconduct, appellant cannot show that, had his attorney objected to any or all of the arguments discussed above, the verdict would have been more favorable to appellant. In the absence of such a showing of prejudice, appellant's ineffective assistance of counsel claim has no merit.

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[8] Penal Code section 667.61 allegations as to all counts that appellant kidnapped a

7. Appellant's procurement conviction was not preempted by his continuous sexual abuse conviction.

Appellant contends his Penal Code section 288.5 conviction for continuous sexual abuse precludes his conviction of procurement because both convictions pertained to I. and the same time period.

Penal Code section 288.5, subdivision (c), provides, in pertinent part, as follows: "No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." The statute does not define "felony sex offense" or enumerate offenses included within the scope of this term.

Appellant's convictions under Penal Code sections 288.5 and 266j both pertained to I. The jury's verdict defined the period of the continuous sexual abuse count as July 1, 2001, to April 30, 2002. The Amended Information alleged the procurement occurred in the overlapping interval of January 1, 2002, to July 10, 2002. However, the evidence established that appellant and I. were in Mexico from May 29 through July 9, 2002. I. did not testify to any acts of procurement following their return from Mexico, and the entire relationship between I. and appellant came to light and terminated a few days after their return. Accordingly, the effective interval for the procurement ended sometime around May 28, 2002. Because the intervals largely overlapped, the procurement and continual sexual abuse convictions may indeed be based upon conduct occurring during the same time period. It is therefore necessary to determine whether the conduct proscribed by Penal Code section 266j constitutes a "felony sex offense" within the meaning of Penal Code section 288.5, subdivision (c).

Penal Code section 266j provides, in pertinent part, that "[a]ny person who intentionally gives, transports, provides, or makes available, or who offers to give,

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victim were also dismissed.

transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony . . . ." The conduct proscribed by this section therefore relates to sexual offenses against children under the age of 16, but the sexual contact would be between the child and a third person, not the defendant charged with violating section 266j.

The express goal of the Legislature in enacting section 288.5 was "to provide additional protection for children subjected to continuing sexual abuse and certain punishment for persons referred to as 'resident child molesters' by establishing a new crime of continuing sexual abuse of a child under circumstances where there have been repeated acts of molestation over a period of time, and the perpetrator either resides with or has recurring access to the child. . . ." (Stats. 1989, ch. 1402, § 1(b), p. 6138.) The Legislature deemed the new statute necessary to "fortify . . . against constitutional challenge" convictions of resident molesters that were based upon "generic" testimony by child victims, i.e., testimony lacking specificity regarding the specific date and place of each sexual offense occurring over a prolonged period. (*People v. Johnson* (2002) 28 Cal.4th 240, 247.) Section 288.5 therefore effectively creates a catch-all offense that preempts a separate conviction for each individual underlying act that collectively constitutes the continuous sexual abuse. For example, numerous acts of statutory rape regarding I. were subsumed within the section 288.5 charge against appellant.

Conduct violating section 266j would not, however, support a charge of continuous sexual abuse under section 288.5. The latter requires proof that the defendant committed lewd or lascivious acts under section 288 or "substantial sexual conduct," which is defined by Penal Code section 1203.066, subdivision (b), as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (Pen. Code, § 288.5, subd. (a).) Accordingly, consolidating conduct violating section 266j into a continuous sexual abuse charge would not serve the Legislature's purpose in

enacting section 288.5. Deeming a section 266j conviction preempted by a section 288.5 conviction would also violate public policy by permitting a "resident molester" to escape punishment for committing an additional offense and inflicting additional harm by enabling another person to also molest the child.

Appellant argues section 266j constitutes a "felony sex offense" because it is contained "within Chapter 1 ('Rape, Abduction, Carnal Abuse of Children, and Seduction') of Title 9 ('Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals')." However, title or chapter headings are unofficial and cannot alter the explicit scope, meaning or intent of a statute. (*DaFonte v. Up-Right*, *Inc.* (1992) 2 Cal.4th 593, 602.) Appellant also argues that because the requirement of registration as a sex offender applies to a person convicted of violating section 266j, it must be deemed a "sex offense." However, the two statutes serve different purposes. Section 290 requires persons convicted of certain offenses to register as sex offenders because the Legislature deemed such persons likely to commit similar offenses in the future, and compliance with the registration requirement facilitates police surveillance and investigation. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Section 288.5 was intended to avoid problems inherent in prosecuting persons who repeatedly sexually abuse a child over a prolonged period of time. Accordingly, the mere inclusion of section 266j within the scope of convictions triggering the registration requirement does not establish that 266j constitutes a "sex offense" for the preemption provision of section 288.5, subdivision (c).

8. **Appellant was not entitled to a jury determination of factors supporting imposition of consecutive sentences.**

Citing a number of factors in aggravation, the trial court imposed consecutive terms on all counts. Citing *Blakely v. Washington* (2004) 124 S.Ct. 2531 ("*Blakely*") and *Apprendi v. New Jersey* (2000) 530 U.S. 466 ("*Apprendi*"), appellant contends the court violated his due process rights by basing the consecutive terms upon facts not found by the jury.

Apprendi essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury, and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 490.) *Blakely* clarified that the relevant "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 124 S.Ct. at p. 2537, original italics.) The key inquiry is whether the trial court had the authority to impose the particular sentence in question without finding any additional facts or only upon making some additional factual finding. (*Id.* at p. 2538.) If any additional finding of fact is required, *Apprendi* applies. (*Ibid.*)

In contrast to the statutory presumption in favor of the middle term as the sentence for an offense (Pen. Code, § 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences. (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Instead, Penal Code section 669[9] simply directs the

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9 Penal Code section 669 provides, in pertinent part, as follows: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction. . . .

"In the event that the court at the time of pronouncing the second or other judgment upon that person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon that failure to determine, or upon that prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of the notice, determine how the term of imprisonment upon the second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. Upon the failure of the court to determine how the terms of imprisonment

court to determine whether the sentences on multiple offenses must be consecutive or concurrent. If the trial court fails to make such a determination, section 669 states that the terms must be concurrent. The statute therefore sets a default, but not a presumption. California Rules of Court, rule 4.425 sets forth "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences." Although rule 4.406 includes the imposition of consecutive sentences as a sentencing choice that generally requires the trial court to state its reasons, no statute or rule of court requires the court to make an additional factual finding, above and beyond the mere fact of conviction of multiple current offenses, in order to impose consecutive terms. The court has the authority to impose consecutive terms without finding any additional facts. Accordingly, we conclude *Apprendi* and *Blakely* do not apply to the imposition of consecutive sentences. Appellant's contention therefore has no merit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BOLAND, J.

We concur:

COOPER, P. J.

FLIER, J.

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on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."